STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD EDWARD SWATHWOOD,

Defendant-Appellant.

UNPUBLISHED
April 15, 2003

No. 235540
Ingham Circuit Court
LC No. 00-076305-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS RODNEY GAGNE,

Defendant-Appellant.

No. 235541
Ingham Circuit Court
LC No. 00-076306-FC

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants Donald Edward Swathwood and Lewis Rodney Gagne were each charged with three counts of first-degree criminal sexual conduct, MCL 750.520b(f) (sexual penetration through use of force causing injury). Following a jury trial, Swathwood was convicted as charged, and Gagne was convicted of two counts and acquitted of one count of first-degree criminal sexual conduct. The trial court sentenced Swathwood to three concurrent terms of fifteen to thirty years' imprisonment. The court sentenced Gagne to two concurrent terms of twenty-two years and five months to forty-five years in prison. Defendants appeal as of right. We affirm defendants' convictions, and remand for further proceedings.

I. Evidence of the Complainant's Prior Sexual Conduct

Defendants first argue that the trial court erred in excluding evidence of the complainant's past sexual conduct. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary issue of law

regarding admissibility based upon construction of a statute or court rule, however, is subject to review de novo. *Id*. This Court reviews a trial court's exclusion of evidence under the rape-shield law for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

Evidence of specific instances of a victim's past sexual conduct with others is generally legally irrelevant and inadmissible under the rape-shield statute, MCL 750.520j. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). In certain limited situations, evidence that does not come within the specific exceptions of the statute may be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). The rape-shield law, MCL 750.520j(1), provides in relevant part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. *Arenda*, *supra* at 10-11. Application of the rape-shield statute must be done on a case-by-case basis, and the balance between the rights of the victim and the defendant must be weighed anew in each case. *People v Morse*, 231 Mich App 424, 433; 586 NW2d 555 (1998), citing *Adair*, *supra*; *Hackett*, *supra*. "In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Adair*, *supra* at 485, citing *Hackett*, *supra* at 349.

Evidence Concerning Group Sex or "Threesomes"

Defendants argue that the trial court erred in excluding evidence that the complainant participated in group sex or a "threesome" with defendant Gagne and a third person, Ruben Bermudez. We disagree.

The rape-shield statute generally precludes admission of evidence of a victim's past sexual conduct with others, while excepting instances of a victim's past sexual conduct with the defendant to the extent it is relevant and not unfairly unprejudicial. In this case, the prior sexual conduct in question involves both "others", (i.e., Ruben Bermudez,) and defendant Gagne. Defendants argue that the complainant's prior consensual participation in a threesome with Gagne tends to show that the complainant is not averse to such conduct, which is probative of whether she consented in the instant case. The trial court was concerned that although the

threesome was indeed prior sexual conduct with defendant, it also involved a nonactor, Bermudez. Defendants argue that the fact that the complainant's and Gagne's sexual history included another person was merely an aspect or characteristic of their sexual relationship. Defendants argue that without this evidence that group sex was not foreign to the complainant, the jury likely would reject a consent defense because the incident involved more than one partner.

We disagree. Even viewing the evidence as defendants urge, as merely an instance of prior sexual conduct with defendant, an aspect of which was the inclusion of other persons, the evidence is not automatically admissible. Rather, evidence of a victim's prior sexual conduct with defendant is only admissible if "and to the extent that the judge finds that the [ ] evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1); *Adair*, *supra* at 485. Here, the complainant's willing participation in a threesome with Gagne and Bermudez is not probative of whether she consented to a threesome with Gagne and Swathwood on the night of the alleged offense. Notably, the threesome involving Bermudez occurred while the complainant and Gagne were still dating. The instant offense occurred after they had ended their relationship, and it involved Swathwood, not Bermudez. In light of the lack of similarity between the Bermudez threesome and the instant offense, we conclude that the trial court did not abuse its discretion in excluding the evidence.

Defendants also argue that the trial court erred in excluding evidence that the complainant invited Gagne and his father to participate in a threesome. We disagree.

The evidence that the complainant expressed a desire to have a threesome with Gagne and his father is a statement that may also be conduct. In *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998), our Supreme Court addressed the application of the rape-shield statute to a statement, as opposed to conduct, and held that the complainant's statement to a friend about her willingness to have sex was not barred by the rape-shield statute. *Ivers*, *supra* at 326. The Court explained:

> This is not to say, however, that no "statement" would ever be precluded under the rape-shield statute. . . . The important distinction, however, is not so much "statements" versus "conduct" as whether the statements do or do not *amount* to or *reference* specific conduct. Here it is plain that they do neither, and, thus, evidence of the statements would not be barred by rape-shield concerns. [*Id.* at 328-329 (italics in original).]

In the instant case, the complainant's expressed desire to engage in group sex with Gagne and his father is a reference to specific conduct, and therefore inadmissible under the rape-shield statute unless it comes within the exception regarding sexual conduct with the defendant. MCL 750.520j. Although the conduct involved defendant Gagne, like the evidence of the threesome with Bermudez, the evidence is not probative of whether the complainant consented in the instant matter to engage in sexual relations with Gagne and Swathwood. Notably, the *Ivers* Court held that the complainant's statement was not barred by the rape-shield statute because the Court determined that her statement was "incident to the alleged sexual conduct." *Ivers*, *supra* at 327. Such is not the case here. We conclude that the evidence was not relevant to the issue of consent, and that the trial court did not abuse its discretion in excluding the evidence.

Moreover, in light of the other evidence of the complainant's past sexual conduct that the trial court did admit, we reject defendants' argument that their rights of confrontation compelled the admission of this evidence and take note of the evidence that the trial court did admit. The jury heard about "The Tony's Lounge Incident," in which defendants, the complainant, and two other women engaged in group sex, according to defendants' version of the incident. Defendants further testified that the incident included the complainant performing oral sex on Swathwood. Even the complainant testified that after The Tony's Lounge Incident Gagne told her that she had engaged in oral sex with Swathwood, but she was unable to recall whether she had done so because she was intoxicated. Therefore, defendants presented evidence that the complainant was not averse to group sexual activity.

Complainant's Prior Sexual Relations with David Daniel Moore

Defendant Swathwood challenges the exclusion of evidence that the complainant engaged in sexual relations with David Daniel Moore on the day before the alleged offense. Swathwood argues that this evidence is probative of whether defendants' conduct with the complainant was a cause in fact of her injuries. Swathwood relies on the rape-shield statute exception which allows for the admission of evidence of specific instances of a victim's sexual activity "showing the source or origin of semen, pregnancy, or disease." MCL 750.520j(1)(b). In the case on which Swathwood relies, *People v Mikula*, 84 Mich App 108; 269 NW2d 195 (1978), this Court stated:

> It is well settled that where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition. The question in this case is whether the Legislature intended to retain that rule only for the conditions expressly included in the statute – to the exclusion of other physical conditions. We think not. We are persuaded that there is no rational distinction between the evidence expressly allowed under the statute and that offered in this case. [*Id.* at 114 (citations omitted).]

An important distinction is that the *Mikula* case did not involve a consent defense. In *Mikula*, sexual penetration was at issue; here, sexual penetration is not disputed.

Swathwood maintains that he should have been permitted to show that the complainant's sexual activity with Moore could have been the source of her bruises. We disagree. Swathwood made no offer of proof below to show the relevancy of the fact that the complainant engaged in sexual relations with Moore. *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993) (Absent an offer of proof regarding the relevance of the proposed evidence to the purpose for which it is sought to be admitted, the motion must be denied.) *Id*. It was undisputed that defendants sexually penetrated the complainant numerous times with their penises and with objects. Although Swathwood argues that Moore's sexual activity could have been the cause of the complainant's bruises, Swathwood did not allege that the nature of the complainant's sexual relations with Moore were particularly rough or so physical in nature as to cause bruises. Swathwood's offer of proof was merely that the complainant and Moore had sexual relations. Standing alone, there is no basis to conclude that Moore could have caused the complainant's

bruises. Moreover, at the preliminary examination the complainant expressly denied that her sexual conduct with Moore was the cause of her injuries. We find no abuse of discretion in the trial court's exclusion of the evidence.

Complainant's Invitation to David Stout

Defendants argue that the trial court erred in excluding evidence that on the night of the alleged offense, the complainant invited David Stout to participate in the sexual activities with her and defendants. The rape-shield statute does not bar this evidence because this alleged conduct is incident to the charged offense, and the prosecution concedes that the trial court erred in excluding this evidence.

The exclusion of this evidence does not require reversal. The record shows that this evidence was admitted through defendants' testimonies. Swathwood testified that when Stout entered the bedroom, all three of them, Gagne, Swathwood, and the complainant, suggested that Stout join them. Also, Gagne testified that when he and the complainant were engaging in sexual activity in the living room, the complainant invited Swathwood and Stout to come into the living room "and get some." Because the record contains evidence that the complainant invited Stout to join the sexual activity, reversal is not required on this basis.

II. Prosecutorial Misconduct

Defendants argue that the prosecutor improperly vouched for the prosecution witnesses and bolstered the complainant's testimony. Defendant Gagne additionally asserts that the prosecutor improperly argued the nonexistence of evidence of consent that he had attempted to present but that the trial court had excluded. Because defendants did not object to the challenged remarks at trial, we review these unpreserved allegations of prosecutorial misconduct for plain error affecting defendants' substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

Prosecutorial misconduct issues are decided case by case, *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998), and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

Defendants first contend that the prosecutor improperly vouched for his witnesses' credibility. Defendants challenge the following portion of the prosecutor's rebuttal argument:

> What you saw [the complainant] go through on the stand, takes you well beyond reasonable doubt, well beyond reasonable doubt. But apparently she was not only able to try to fool you here, but she fooled Detective Jex and Officer

> Johnson with over 30 years combined experience in law enforcement. Her emotional upset and breakdown, her own physician of over 25 years, as well as an emergency room physician, and a nurse who had worked in the emergency room for 12 years, supposed to believe that she fooled them.

A prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify truthfully. *Bahoda*, *supra* at 276; *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to those of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995).

We agree that the prosecutor's argument was improper. The substance of the argument suggested that the prosecution witnesses believed the complainant and that the jury should believe them on the basis of their professional experience. The witnesses testified about their observations; they did not opine about the complainant's credibility. The complainant's doctor testified that her bruises could have been the result of some other activity, and that it was impossible to determine from looking at the bruises when and how they were caused. Although defendants argue that the prosecutor vouched for the witnesses, a better characterization of the prosecutor's remarks is that they were not supported by the evidence. *Schutte*, *supra* at 721.

We are not persuaded that reversal is required on this basis. Absent an objection, the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice. *Schutte*, *supra* at 721-722, quoting *Bahoda*, *supra* at 281. Further, the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Because defendants have not established outcome-determinative plain error, reversal is not warranted. *Carines*, *supra*; *Schutte*, *supra*.

Next, defendant Gagne argues that the prosecutor engaged in misconduct by commenting on the nonexistence of evidence of consent that he had attempted to present but that the trial court had excluded. Gagne contends that the prosecutor's remarks that the defense's theory lacked evidentiary support was essentially a comment on evidence that had been excluded and an improper attempt to use that excluded evidence to bolster the prosecutor's case. We disagree.

Defendant Gagne challenges the following remarks made by the prosecutor during closing argument:

> . . . ladies and gentlemen, [the complainant] told you on the stand, I was in love with [Gagne], I loved him then. That does not explain why she would have anything to do with Mr. Swathwood. It does not explain why she would ever have anything to do with David Stout. Sexual penetration in every imaginable way, ladies and gentlemen, all at [the complainant's] direction, including multiple penetrations of her anus with their penises, with vibrators and with a wine bottle. All of this from a woman who has hemorrhoids, ladies and gentlemen, that bleeds. But she wanted them to do this. She asked for it. She told them what to do, according to these men's testimonies.
>
> * * *

> The addition, ladies and gentlemen, of David Stout, as a supposed sexual partner to [the complainant] during this scenario *is an attempt to in essence portray [the complainant] as some kind of an, I don't know what kind of word you would use, somebody's maniac, somebody's fool of some kind.*
>
> * * *
>
> Now, according to Mr. Gagne, . . . they scoot across the floor while he is still sexually penetrating her, and then she starts to perform oral sex on Mr. Swathwood while giving Mr. Stout a hand job, something, ladies and gentlemen, I would suggest two things about. Number one, it's not likely something that, if any man was ever involved in such a thing, that he would forget or fail to mention. And, number two, it's certainly a version that is *much more consistent with the pornographic movie than real life*. [Emphasis added.]

The prosecutor's argument was not improper. The prosecutor did not comment on excluded evidence of consent. Notably, The Tony's Lounge Incident was admitted into evidence, and contrary to the prosecutor's argument to the jury, defendants offered evidence which, if believed by the jury, would very well explain why the complainant "would have anything to do with Mr. Swathwood." With regard to Stout, the jury heard conflicting evidence of Stout's participation. Swathwood testified that he, Gagne, and the complainant, invited Stout to join them in the bedroom, and Gagne testified that while they were in the living room, the complainant invited Stout to join them.

The prosecutor's argument did not urge the jury to question the absence of evidence of prior consensual group sex activity. The prosecutor was merely attacking Stout's credibility. A prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *Schutte*, *supra* at 722. In sum, the prosecutor was merely arguing the implausibility of defendants' story. The prosecutor did not make reference to excluded evidence, nor did she fault defendants for failing to produce evidence to support their theory.

III. Assistance of Counsel

Defendant Gagne argues that his trial counsel's failure to object to instances of prosecutorial misconduct constituted ineffective assistance of counsel. We disagree.

Because defendant did not move for a new trial or a *Ginther*[1] hearing, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Knapp, supra* at 385, citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Gagne was not denied the effective assistance of counsel on the basis of his attorney's failure to object to the alleged prosecutorial misconduct. As discussed previously, Gagne's allegation that the prosecutor improperly made reference to the absence of evidence of consent is without merit. Accordingly, his attorney's failure to object to this remark is not ineffective assistance of counsel. With respect to the other challenged remark suggesting that the prosecution witnesses believed the complainant, even if an objection would have been appropriate, it is not apparent from the record that counsel's failure to object amounted to deficient performance of trial counsel. *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996) ("[T]here are times when it is better not to object and to draw attention to an improper argument."). On the basis of the record, defendant has not overcome the presumption of sound trial strategy, nor has defendant shown a reasonable probability that, but for counsel's alleged error, the result of the trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The court's instructions to the jury were sufficient to cure any prejudice. *Shutte, supra* at 721-722.

IV. Great Weight and Sufficiency of the Evidence

Defendant Swathwood argues that the jury's verdicts were against the great weight of the evidence. Swathwood maintains that the prosecution failed to establish that defendants used force to sexually penetrate the complainant.

Because Swathwood failed to preserve this issue by moving for a new trial below, we need not address this issue. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); MCR 2.611(A)(1)(e). Although Swathwood states his issue as a challenge to the jury verdict based on the great weight of the evidence, in substance his argument challenges the sufficiency of the evidence supporting his convictions, the preservation of which requires no special action in the trial court. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999).

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). "[T]he prosecutor need not negate every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecutor need only prove the elements of the crime beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id*. at 400.

Under MCL 750.520b(f), a person commits first-degree criminal sexual conduct if he engages in sexual penetration with another person using force or coercion and causes personal

injury to the other person.[2] "Force or coercion" includes a situation in which "the actor overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(f)(i); *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002).

The complainant testified that defendants wrapped their legs around her legs and shoulders and prevented her from escaping. She testified that she did not want to perform the sexual acts with defendants. She also testified that while defendants switched positions they continued to hold her down and she was unable to free herself from them. This case was a credibility contest between the complainant and defendants. Notwithstanding defendants' testimonies that the sexual activity was consensual, the complainant's testimony was sufficient to permit the jury to find that defendants used force against her to accomplish the sexual penetrations. *Wolfe, supra* at 514-515 (This Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses.).

V. Cumulative Error

Defendant Swathwood argues that the cumulative effect of the asserted errors denied him a fair trial. He maintains that because this case was a credibility contest, Swathwood was severely prejudiced by the exclusion of evidence of the complainant's sexual activities involving others, and that these errors were exacerbated by the prosecutor's misconduct during closing argument.

We review a cumulative error claim to determine if the combination of alleged errors denied the defendant a fair trial. *Knapp, supra* at 387. The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

We are not persuaded that the trial court's erroneous ruling excluding evidence that the complainant invited Stout to participate in the sexual activity affected the outcome of the trial. Evidence of the complainant's willingness to have Stout participate in the sexual activity was admitted through defendants' testimonies as discussed previously. Further, the prosecutor's closing argument suggesting that the prosecution witnesses believed the complainant was harmless because the court's instructions to the jury cured any prejudice. Defendant was not denied a fair trial on the basis of these two errors.

VI. Sentencing

Defendant Swathwood argues that he is entitled to resentencing because the trial court erroneously scored the offense variables, and because his sentence violates the principle of proportionality. Swathwood preserved his challenges to the scoring of the offense variables by objecting at sentencing. *People v McGuffey*, 251 Mich App 155, 164-166; 649 NW2d 801 (2002). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). This Court will uphold the sentencing court's scoring decisions if there is

[2] Swathwood does not challenge the "personal injury" element of the offense.

any supporting evidence in the record. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Offense variable (OV) 3 requires the trial court to assess ten points where "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1). Swathwood argues that the record is devoid of evidence that the complainant's physical injuries required medical treatment. The prosecution concedes this point, and agrees that Swathwood should not have been assessed any points for OV 3.

Swathwood argues that the court erred in assessing fifty points for OV 7, which applies where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). We disagree. Under the sentencing guidelines, MCL 777.37(2)(b), "[s]adism means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." The complainant testified that this incident lasted several hours and that defendants repeatedly penetrated her with their penises, vibrators, and a wine bottle. The record contains evidence that Swathwood threatened to break the wine bottle while it was inside the complainant. The complainant testified that defendants ignored her pleadings for them to stop, and that they laughed at her. We conclude that the record evidence supports the trial court's scoring of OV 7.

Lastly, Swathwood challenges the scoring of OV 10, MCL 777.40, which concerns the "exploitation of a vulnerable victim." He argues that in light of his size and his intoxication on the night in question, he was not in a position to exploit the complainant.

Offense variable ten provides that five points should be assessed where "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). It was undisputed that the complainant had been drinking large quantities of alcohol and was intoxicated. Defendants testified that she had smoked crack cocaine. The record evidence supports the court's score of OV 10, which concerns the victim's vulnerability, irrespective of defendants' intoxication.

The erroneous scoring of OV 3 resulted in a guidelines range of 171 to 427 months. The corrected scoring would result in a guidelines range of 135 to 337 months. We note that because defendant's 180-month minimum sentence is at the low end of even the corrected guidelines range, it is not likely that defendant was prejudiced by the error. However, a defendant is entitled to have his sentencing guidelines range correctly calculated so that the court may impose an appropriate sentence in light of that range. MCL 769.34(10). Therefore, we remand for the trial court to address whether the change in the guidelines range would affect its sentencing decision. If the trial court determines that it would impose a different sentence, then Swathwood's sentence shall be set aside and the trial court shall resentence him.

We reject defendant Swathwood's final argument on appeal that his sentence is not proportionate. Swathwood's sentence falls within the corrected guidelines range. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell